

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT C. TRAVIS
Claimant

VS.

DILLON COMPANIES, INC.
Respondent,
Self-Insured

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Docket No. 223,611

ORDER

The respondent appealed the July 22, 1999 Award entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on December 1, 1999.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a February 14, 1997 accident and resulting low back injury. The parties stipulated that claimant sustained a 16 percent whole body functional impairment as a result of that work-related accident. For the period to July 15, 1998, the Judge found that claimant had a 16 percent permanent partial general disability. For the period from July 15, 1998, to April 27, 1999, the Judge found that claimant had a 61.45 percent permanent partial general disability.¹ For the period commencing April 27, 1999, the Judge found a 58.25 percent permanent partial general disability.²

¹ This permanent partial general disability rating is the average of a 61.4 percent wage loss and 61.5 percent task loss.

² This permanent partial general disability rating is the average of a 55 percent wage loss and 61.5 percent task loss.

The respondent contends the Judge erred. It argues that claimant's work disability is only 26 percent. It argues that the Judge should have (1) imputed \$419 as claimant's post-injury average weekly wage, making the wage loss only 41 percent, (2) adopted Dr. C. Reiff Brown's opinion that claimant had only an 11 percent task loss, and (3) averaged those percentages and found that claimant's permanent partial general disability beginning July 15, 1998, was only 26 percent. Conversely, the claimant argues that the Award should be either affirmed or increased to reflect a 75.5 percent permanent partial general disability.

The only issue before the Appeals Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Mr. Travis injured his low back on February 14, 1997, while handling a box of chicken. The parties stipulated that Mr. Travis sustained a 16 percent whole body functional impairment as a result of that accidental injury.
2. After seeing several other physicians, Mr. Travis eventually came under the treatment of orthopedic surgeon Anthony G. A. Pollock, M.D. On November 4, 1997, Dr. Pollock performed a two-level fusion at the L4-5 and L5-S1 intervertebral levels. A bone stimulator that was used in Mr. Travis' surgery was removed in June 1998. On July 15, 1998, Dr. Pollock released Mr. Travis with the restrictions determined by a functional capacity evaluation performed days earlier. Among other restrictions, the functional capacity evaluation report limited Mr. Travis' lifts from floor to waist to 30 pounds on an occasional basis; limited the amount he carried to 30 pounds on an occasional basis; and limited his overhead lifting to 20 pounds and then only rarely.
3. Dr. Pollock did not testify. But the parties deposed both Pedro A. Murati, M.D., and C. Reiff Brown, M.D. Dr. Murati examined Mr. Travis at his attorney's request in August 1998. Dr. Murati agreed that Mr. Travis should observe the restrictions set forth in the functional capacity evaluation and should also avoid frequently and constantly lifting. As a result of the low back injury, Dr. Murati believed that Mr. Travis could no longer perform manual labor and that he had lost the ability to perform 10 of 14, or 71 percent, of the work tasks that he had performed in the 15-year period before the February 1997 accident.
4. At Dillon's request, Dr. C. Reiff Brown reviewed Mr. Travis' medical records. Considering the restrictions set forth in the functional capacity evaluation, Dr. Brown believed that Mr. Travis had lost the ability to perform 5 of 9, or 56 percent, of the work tasks that he had performed in the 15-year period before the February 1997 accident.

5. The Judge averaged the doctors' task loss opinions and found that Mr. Travis had sustained a 61.5 percent task loss. The Appeals Board does not disagree with the Judge's method but finds that an average of the doctors' opinions equals 64 percent.³

6. The Appeals Board agrees with the Judge's analysis that Mr. Travis did not make a good faith effort to find appropriate full-time employment once he was released with permanent work restrictions by Dr. Pollock in July 1998. The Appeals Board agrees with the Judge's finding that Mr. Travis retained the ability and capacity to earn \$280 per week despite his injury and, therefore, that amount should be imputed to him as his post-injury wage for the period commencing July 15, 1998. Therefore, for the period from July 15, 1998, to April 27, 1999, the date that Mr. Travis began working for his brother's scale company, there is a 61 percent difference in pre- and post-injury wages.⁴

7. Mr. Travis began working for his brother on April 27, 1999, earning \$8 per hour and working overtime. The parties stipulated into evidence a wage record that indicates that Mr. Travis earned \$396 in overtime over a four-week period. Based upon that wage information, the Appeals Board finds that commencing April 27, 1999, Mr. Travis began earning approximately \$419 per week, which is \$320 per week regular pay and \$99 per week overtime. Comparing \$419 to \$712.08 yields a difference of 41.16 percent, which is rounded to 41 percent.

8. To the extent they are not inconsistent with the above, the Appeals Board adopts the findings set forth in the Award.

CONCLUSIONS OF LAW

1. The Award should be modified.

2. Because a low back injury is an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and

³ Dr. Murati found that Mr. Travis lost the ability to do 10 of 14 work tasks, which equates to a 71 percent loss. On cross-examination, Dr. Brown indicated that Mr. Travis had lost the ability to do 5 of 9 work tasks. Averaging 71 percent and 56 percent equals 63.5 percent which rounds to 64 percent.

⁴ The parties stipulated that Mr. Travis' average weekly wage was \$712.08, which included additional compensation items. Comparing \$280 to \$712.08 yields a difference of 60.68 percent which rounds to 61 percent.

the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk⁵ and Copeland.⁶ In Foulk, the Court held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . . (Copeland, p. 320.)

3. As indicated in the findings above, Mr. Travis did not put forth a good faith effort to find appropriate employment once he was released by the doctor on July 15, 1998. Therefore, \$280 should be imputed for Mr. Travis' post-injury wage for the period from July 15, 1998, to April 27, 1999. Averaging the 61 percent wage loss with the 64 percent task loss produces a 63 percent permanent partial general disability for that period.

4. For the period commencing April 27, 1999, Mr. Travis has a 41 percent wage loss and a 64 percent task loss, which produces a 53 percent permanent partial general disability.

AWARD

WHEREFORE, the Appeals Board modifies the July 22, 1999 Award and increases the permanent partial general disability rating from 61.45 percent to 63 percent for the period from July 15, 1998, to April 27, 1999, and decreases the permanent partial general disability rating from 58.25 percent to 53 percent for the period commencing April 27, 1999.

Robert C. Travis is granted compensation from Dillon Companies, Inc., for a February 14, 1997 accident and resulting disability. Based upon an average weekly wage

⁵ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁶ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

of \$712.08, Mr. Travis is entitled to receive 51.14 weeks of temporary total disability benefits at \$338 per week, or \$17,285.32. Thereafter, 22.43 weeks of benefits are due at \$338 per week, or \$7,581.34, for a 16 percent permanent partial general disability for the period from February 8, 1998, through July 14, 1998. Thereafter, 40.86 weeks of benefits are due at \$338 per week, or \$13,810.68, for a 63 percent permanent partial general disability for the period from July 15, 1998, through April 26, 1999. Thereafter, 137.51 weeks of benefits are due at \$338 per week, or \$46,478.38, for a 53 percent permanent partial general disability for the period commencing April 27, 1999. The total award is \$85,155.72.

As of December 8, 1999, there is due and owing to the claimant 51.14 weeks of temporary total disability compensation at \$338 per week in the sum of \$17,285.32, plus 95.58 weeks of permanent partial general disability compensation at \$338 per week in the sum of \$32,306.04, for a total due and owing of \$49,591.36, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$35,564.36 shall be paid at \$338 per week until further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Scott J. Mann, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director